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No. 89-1991

In the Supreme Court of the United States

OCTOBER TERM, 1990

LAWRENCE HOCHHEISER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was properly held in contempt of court under the summary contempt procedures of Fed. R. Crim. P. 42(a).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 897 F.2d 1227. The order of the district court (Pet. App. 17a-21a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 1990. A petition for rehearing was denied on April 23, 1990. Pet. App. 14a-15a. The petition for a writ of certiorari was filed on June 20, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On May 18, 1989, petitioner was twice held in criminal contempt during a trial in the United States District Court for the Southern District of New York. He was fined a total of $750. The court of appeals reversed the first contempt citation but affirmed the second. Pet. App. 1a-13a.

1. Petitioner represented Federico Giovanelli, one of three defendants in a prosecution for RICO violations (18 U.S.C. 1962(c) and (d)). Pet. App. 3a-4a. On the fourth day of trial, petitioner was held in contempt during his cross-examination of FBI Special Agent Michael Gillispie. On direct examination, Gillispie had testified about his surveillance of petitioner's client approximately three and a half years earlier. On cross-examination, petitioner established that Gillispie had studied a written surveillance report before testifying in order to memorize the details of his observations. Petitioner sought to have Gillispie read portions of the report into the record; his request was disallowed by the district court because the report was not in evidence. The court in turn declined to receive the report into evidence, finding that the report was hearsay. Pet. App. 4a-5a. The court ruled that petitioner could use the report to refresh the witness's recollection, but specified that counsel should not "ask [Gillispie] to read from the document." Pet. App. 5a. Petitioner questioned Gillispie further and then sought to have the report admitted as past recollection recorded. After a short *voir dire* examination by the government, the trial judge found that the witness's recollection had already been refreshed and thus that the report itself was not admissible. Pet. App. 5a, 18a-19a.

Petitioner then attempted to impeach Gillispie's credibility by showing that Gillispie's own recollection of the events more than three years before was poor and that he was relying on the report for his testimony. The district court, concluding that petitioner was continuing his attempt to have the report admitted as a past recollection recorded, ordered petitioner to move to another subject. When petitioner asked another similar question, the court reiterated that it had already ruled on the admissibility of the report. Pet. App. 5a-6a, 19a. Petitioner responded that he was asking only whether Gillispie had relied on the accuracy of the report and was not seeking to have the report admitted. The court repeated that it had already ruled. Pet. App. 6a.

Petitioner then asked another question of Gillispie about the report; the trial judge excused the jury and held petitioner in contempt, imposing a $250 fine for willfully disobeying the court's rulings. Pet. App. 6a, 19a-20a. The judge then ordered that the jury be returned to the courtroom. Petitioner protested that he had not acted deliberately. The judge reiterated that she had ruled, and that further argument could be presented only on appeal. She repeated her order that the jury be returned to the courtroom. C.A. App. 182; Pet. App. 6a. Petitioner again began to argue; the judge stopped him with another command that the jury be brought in. As the jury entered the courtroom, petitioner stated, "I won't pay. You can put me in jail, Judge." The court again excused the jury and fined petitioner $500 for his deliberate challenge to the court's authority in the presence of the jury. C.A. App. 182-183; Pet. App. 6a, 20a.

2. On appeal, the court upheld the power of the district court to impose summary contempt under

Fed. R. Crim. P. 42(a) rather than to employ the notice and hearing provisions of Rule 42(b). After tracing the history of summary contempt powers, the court concluded that a "compelling reason for an immediate remedy" exists "[w]hen the contumacious conduct occurs in open court during an ongoing trial." Pet. App. 9a.

On the merits, the court of appeals reversed the first contempt citation, concluding that the district court had mistaken petitioner's attempt to impeach Gillispie's credibility for continued resistance to its ruling that the report was inadmissible as a past recollection recorded. Pet. App. 9a-11a. The court of appeals upheld the second contempt citation, however, noting that it consisted of "an insolent remark made directly to the judge" rather than a failure to obey a court order. Pet. App. 11a. The court ruled that a lawyer's desire to vent frustration over a court's ruling, even a ruling perceived to be improper, "does not take precedence over the overriding need to preserve a court's authority and to maintain order in the courtroom." Pet. App. 12a. The court of appeals confirmed that the record showed that petitioner knew the jury had returned to the courtroom before he made his insolent remark. *Ibid.* The court noted that petitioner's misbehavior led the court to dismiss the jury for a second time, and thus actually obstructed the administration of justice. Pet. App. 13a.

ARGUMENT

Petitioner argues (Pet. 29-45) that the court below erred in upholding his conviction under the summary contempt procedures of Fed. R. Crim. P. 42(a) rather than affording him a hearing under Rule 42(b).

1. The plain terms of Rule 42(a) provide that a criminal contempt "may be punished summarily if the judge certifies that the judge saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court." See *United States* v. *Wilson*, 421 U.S. 309, 315 (1975). Petitioner does not dispute that the judge saw and heard the behavior at issue here and that it was committed in the court's presence. As the Rule requires, the district court has so certified. See Pet. App. 17a-21a.[1]

It is well settled that summary contempt sanctions may be used to punish misbehavior that constitutes "an affront to the court," and thus disrupts or frustrates "the progress of the trial and hence the orderly administration of justice." *Wilson*, 421 U.S. at 316; see *Codispoti* v. *Pennsylvania*, 418 U.S. 506, 513-515 (1974). The use of summary procedures does not violate constitutional guarantees because the "judicial process [must be] * * * supervised and controlled by a neutral judge representing the overriding social interest in impartial justice and with power to curb both adversaries." *Sacher* v. *United States*, 343 U.S. 1, 8 (1952); see *In re McConnell*, 370 U.S. 230, 234 (1962); *Cooke* v. *United States*, 267 U.S. 517, 534-536 (1925). As this Court has put it, "The Constitution would protect none of us if it prevented the

[1] By contrast, Rule 42(b) provides that criminal contempts that are not heard and seen by the judge and are not committed in the presence of the court "shall be prosecuted on notice."

courts from acting to preserve the very processes that the Constitution itself prescribes." *Codispoti*, 418 U.S. at 514.

2. The determination whether to impose summary contempt penalties under Rule 42(a) in a given case rests in the discretion of the district court. *Wilson*, 421 U.S. at 316-317; see, *e.g.*, *In re Contempt of Greenberg*, 849 F.2d 1251, 1253 (9th Cir. 1988); *In re McDonald*, 819 F.2d 1020, 1024 (11th Cir. 1987); *United States* v. *Moschiano*, 695 F.2d 236, 251-252 (7th Cir. 1982), cert. denied, 464 U.S. 831 (1983). Petitioner's fact-bound contention (Pet. 17-29, 34-36) that the district court abused its discretion in this case does not warrant this Court's review.

The court of appeals correctly recognized that instituting summary contempt procedures under Rule 42(a) is appropriate only if a party, in the presence of the court, engages in contemptuous behavior which amounts to "an actual obstruction of justice" (*In re McConnell*, 370 U.S. at 234) so that there is a "compelling reason for an immediate remedy" (*Wilson*, 421 U.S. at 318). See Pet. App. 8a-9a. The court of appeals properly determined that those conditions were satisfied in this case.

Petitioner's statement was plainly contemptuous of the district court's authority; it had no arguable value as advocacy. In addition, it amounted to "an actual obstruction of justice," because petitioner denigrated the authority of the court before the jury and delayed the progress of the trial both by occupying the court with continued protests and by forcing the court to have the jury retire for a second time. See, *e.g.*, *In re McDonald*, 819 F.2d at 1024-1025.

The court's conclusion that immediate action was necessary was warranted in light of the fact that pe-

titioner made his statement after the court had repeatedly ordered the jury into the courtroom and petitioner had initiated several exchanges with the court. See C.A. App. 182-183. As the district court noted (C.A. App. 183-184), the door to the courtroom was open and the jury could be heard coming in. The court reporter had already recorded the entrance of the jury when petitioner stated in the jury's presence that he would not pay his fine and that the court could jail him instead. Petitioner's persistence in these circumstances justified the district court's decision that quick action was needed to regain control of the proceeding.[2]

Contrary to petitioner's contention (Pet. 21-26, 27), the district court's conclusion does not conflict with any decision of this Court. In *In re McConnell*, *supra*, a lawyer stated that he intended to continue to ask questions that the trial judge had forbidden him to ask. But, after a brief recess called by his co-counsel, the lawyer did not persist in his questioning. As the Court ruled, the sequence of events made clear

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[2] Petitioner's assertion (Pet. 12, 36-40) that the courts below did not consider whether he intended his contumacious conduct beyond a reasonable doubt is without merit. The district court found that petitioner had "deliberately challeng[ed] and argu[ed] with the court in the presence of the jury" and had "deliberately attempt[ed] to bring about a mistrial." Pet. App. 20a-21a. The court of appeals in turn considered and found sufficient the evidence that petitioner knew the jury was returning and yet continued in his disruptive remarks. Pet. App. 12a. In fact, as the court of appeals observed, the district court's previous contempt citation of another counsel put petitioner on notice that the court intended to impose fines for disruptive conduct. Pet. App. 12a-13a. The court of appeals then concluded, "[t]his was not a case where a 'reasonable person would not know that the court considered his conduct contemptuous.'" Pet. App. 13a.

that no obstruction of justice had occurred. 370 U.S. at 235-236. Here, by contrast, petitioner showed no sign that he would end his resistance to the court's commands. Rather, the judge was required to send the jury from the courtroom and thus delay the trial in order to assure that she retained control of the courtroom.

Nor does *Mayberry* v. *Pennsylvania*, 400 U.S. 455 (1970), aid petitioner. There, a defendant represented himself at trial and made various insulting and vulgar comments to the trial judge. Rather than imposing summary contempt citations immediately, the judge waited until the end of trial to find the defendant in criminal contempt on various specifications. *Id.* at 455-462. Although this Court reversed the contempt citations, the Court did so not because the defendant's comments did not obstruct justice. Instead, the Court ruled that because the comments constituted a highly personal attack on the trial judge, the court should have asked another judge to sit in judgment in his place. *Id.* at 464-466. Thus, nothing in *Mayberry* supports petitioner's claim that his comments were not disruptive.[3]

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[3] Finally, petitioner asserts (Pet. 26-29) that the decision below conflicts with an earlier decision of the same court, *United States* v. *Lumumba*, 741 F.2d 12 (2d Cir. 1984). Intra-circuit conflicts do not justify review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). In any case, in *Lumumba* the court based its decision to reverse a contempt conviction on the conclusion that the summary procedures of Rule 42(a) are not appropriate where final adjudication and punishment are deferred until the close of trial. 741 F.2d at 15-17; see *United States* v. *Lumumba*, 794 F.2d 806, 808 (2d Cir. 1986). Here, the district court acted immediately after petitioner's mid-trial remark, as is contemplated in summary contempt proceedings under Rule 42(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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